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CHARLES ELMO

Supreme Court of the United States

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO REPLY BRIEF FOR APPELLANTS.

JOHN C. HIGGINS,
Solicitor for Appellants.

SULLIVAN & CROMWELL,
EDWARD J. MCGRATTY, JR.,
Of Counsel.

APPENDIX TO REPLY BRIEF FOR APPELLANTS

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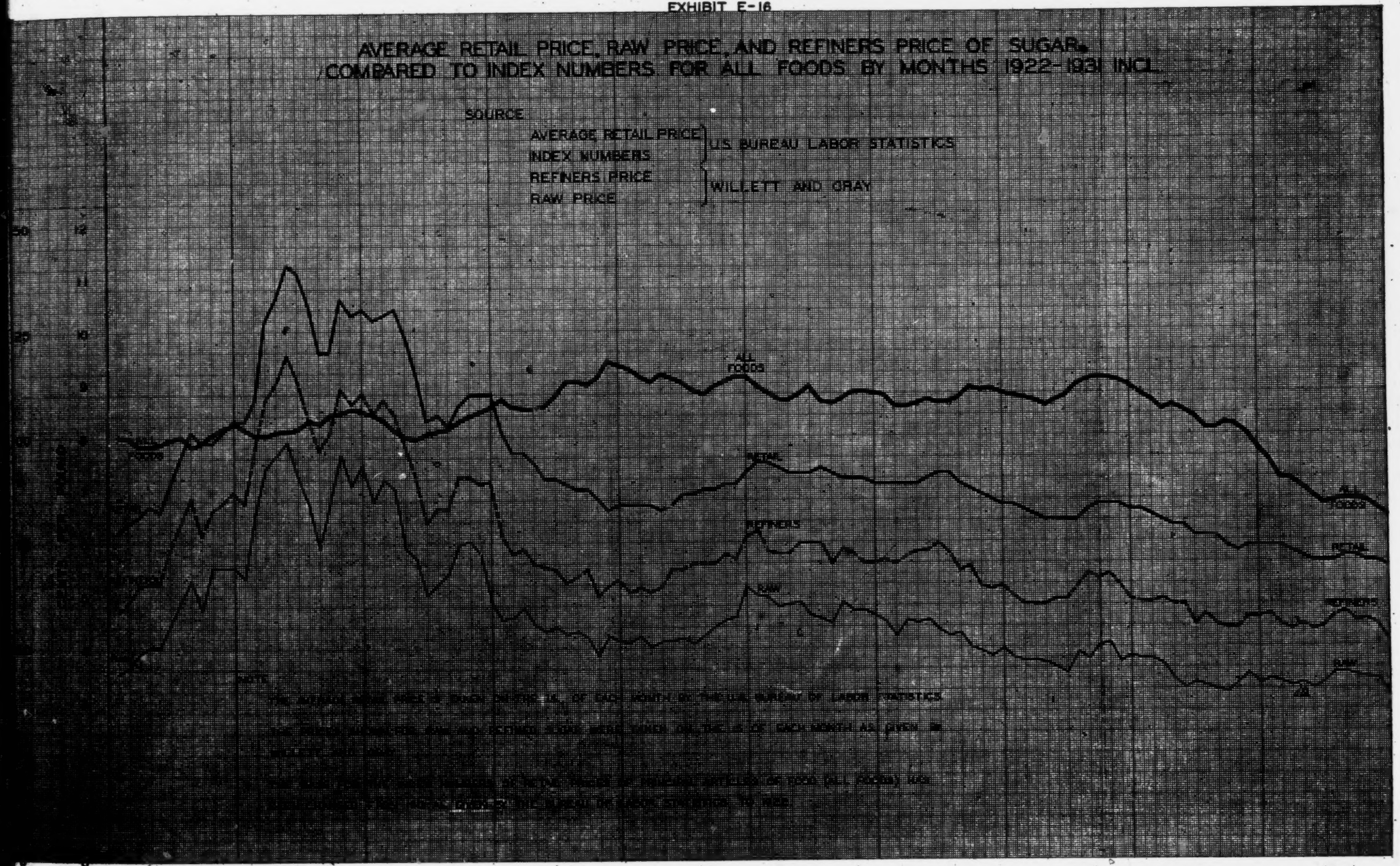
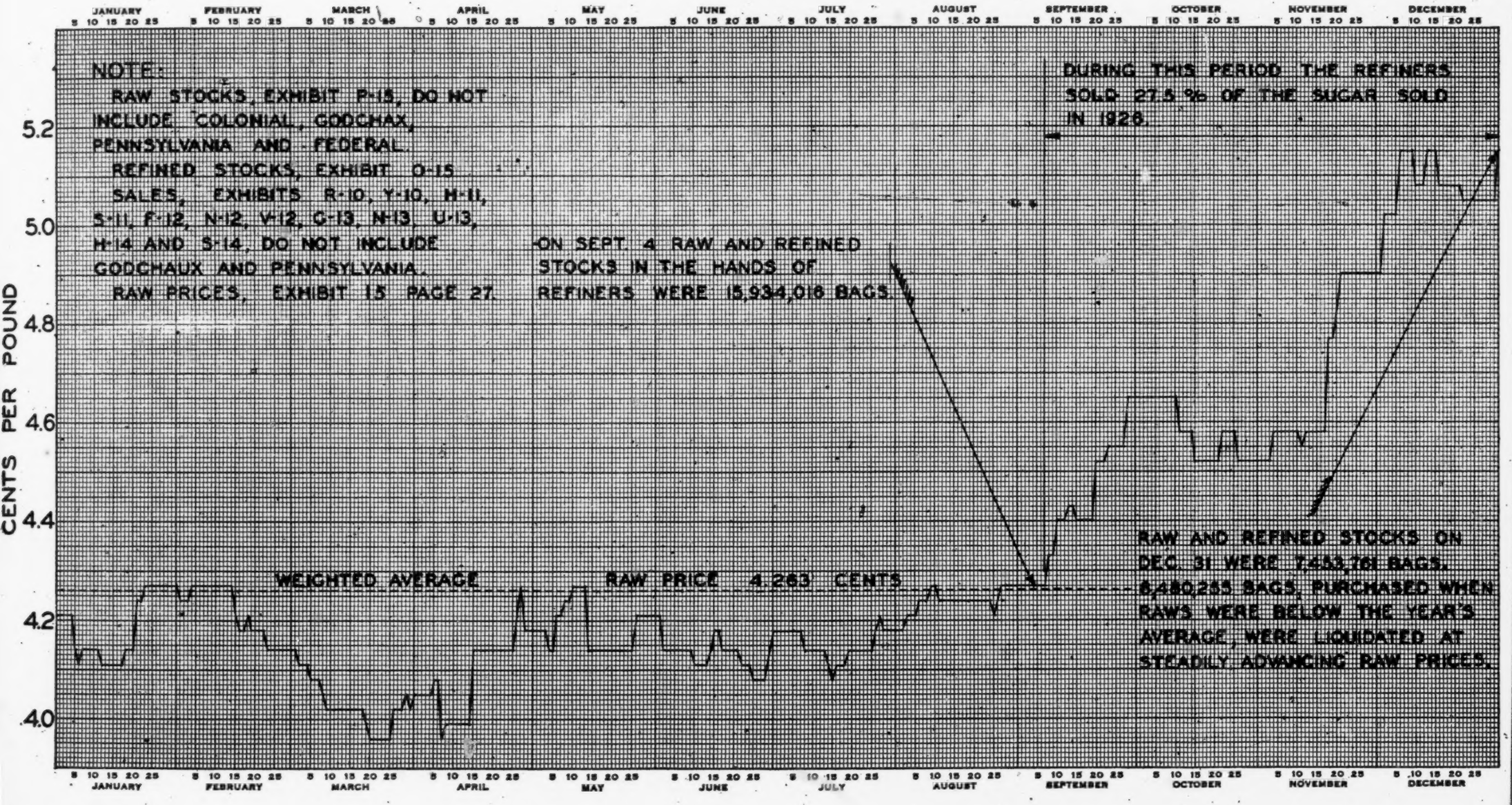

AVERAGE RETAIL PRICE, RAW PRICE, AND REFINERS PRICE OF SUGAR
COMPARED TO INDEX NUMBERS FOR ALL FOODS BY MONTHS 1922-1931 INCL.
SOURCE
AVERAGE RETAIL PRICE
INDEX NUMBERS
REFINERS PRICE
RAW PRICE
U.S. BUREAU LABOR STATISTICS
WILLETT AND GRAY
ALL FOODS
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931

RAW PRICE CHANGES

Change in Fractions of a Cent Per Pound	1924 Number	1924 Cumulative Total Number	1925 Number	1925 Cumulative Total Number	1926 Number	1926 Cumulative Total Number	1927 Number	1927 Cumulative Total Number	1928 Number	1928 Cumulative Total Number	1929 Number	1929 Cumulative Number Total	1930 Number	1930 Cumulative Total Number	1931 Number	1931 Cumulative Total Number
.010	..	..	1	..	..	..	..	..	2	..	1	..	16	..	16	..
.012	..	..	..	..	..	..	..	..	..	..	2	3	..	..	..	..
.015	..	..	..	..	..	..	..	..	3	5	2	5	..	..	..	..
.017	..	..	..	..	..	..	..	..	2	7	..	..	..	..	..	..
.018	..	..	..	..	..	..	..	..	..	..	4	9	..	..	..	..
.020	..	..	2	3	..	..	..	..	4	11	1	10	19	35	37	53
.025	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
.030	..	..	43	46	46	..	33	..	34	45	37	47	33	68	18	71
.035	..	..	..	..	..	..	..	..	3	48	..	..	..	..	..	..
.040	..	..	9	55	7	53	5	38	6	54	2	49	5	73	12	83
.045	..	..	..	..	..	..	..	..	6	60	..	..	..	..	..	..
.050	..	..	1	56	..	..	..	..	4	64	..	..	4	77	16	99
.055	..	..	..	..	..	..	..	..	3	67	..	..	..	..	..	..
.060	15	..	30	86	10	63	33	71	17	84	28	77	13	90	4	103
.070	18	33	13	99	12	75	10	81	4	88	6	83	4	94	2	105
.075	..	..	..	..	..	..	..	..	1	89	..	..	..	..	..	..
.080	..	..	..	..	..	..	..	..	1	90	..	..	5	99	..	..
.090	..	..	6	105	1	76	5	86	3	93	3	86	4	103	1	106
.100	..	..	..	..	3	79	2	88	1	94	1	87	2	105	1	107
.110	..	..	..	..	..	..	..	..	..	..	..	..	1	106	..	..
.120	33	66	6	111	3	82	4	92	2	96	1	88	..	..	1	108
.130	28	94	3	114	1	83	1	93	2	98	3	91	1	107	..	..
.150	..	..	..	..	1	84	..	..	..	..	..	..	..	..	..	..
.160	..	..	..	..	..	..	1	94	3	101	..	..	1	108	..	..
.180	2	96	1	115	..	..	..	..	..	..	..	..	..	..	..	..
.190	5	101	..	..	1	85	..	..	..	..	..	..	1	109	..	..
.220	..	..	..	..	..	..	..	..	..	..	..	..	1	110	..	..
.250	8	109	..	..	..	..	..	..	..	..	..	..	..	..	..	..
.260	1	110	..	..	..	..	..	..	..	..	..	..	..	..	..	..
.380	2	112	..	..	..	..	..	..	..	..	..	..	..	..	..	..
.440	1	113	..	..	..	..	..	..	..	..	..	..	..	..	..	..
.510	1	114	..	..	..	..	..	..	..	..	..	..	..	..	..	..
.620	1	115	..	..	..	..	..	..	..	..	..	..	..	..	..	..

DAILY RAW PRICE
1926


JANUARY
FEBRUARY
MARCH
APRIL
MAY
JUNE
JULY
AUGUST
SEPTEMBER
OCTOBER
NOVEMBER
DECEMBER
5 10 15 20 25
CENTS PER POUND
5.2
5.0
4.8
4.6
4.4
4.2
4.0
NOTE:
RAW STOCKS, EXHIBIT P-15, DO NOT INCLUDE COLONIAL, GODCHAX, PENNSYLVANIA AND FEDERAL.
REFINED STOCKS, EXHIBIT O-15
SALES, EXHIBITS R-10, Y-10, H-11, S-11, F-12, N-12, V-12, C-13, N-13, U-13, H-14 AND S-14, DO NOT INCLUDE GODCHAUX AND PENNSYLVANIA.
RAW PRICES, EXHIBIT 15 PAGE 27.
ON SEPT. 4 RAW AND REFINED STOCKS IN THE HANDS OF REFINERS WERE 15,934,016 BAGS.
DURING THIS PERIOD THE REFINERS SOLD 27.5 % OF THE SUGAR SOLD IN 1926.
WEIGHTED AVERAGE
RAW PRICE 4.263 CENTS
RAW AND REFINED STOCKS ON DEC. 31 WERE 7,453,761 BAGS. 6,480,255 BAGS, PURCHASED WHEN RAWS WERE BELOW THE YEAR'S AVERAGE, WERE LIQUIDATED AT STEADILY ADVANCING RAW PRICES.

DETAILED REVIEW OF FACTS AND RECORDS IN CASES CITED IN REPLY BRIEF FOR APPELLANTS

I. The "Price-Fixing" Cases

In the leading *Trenton Potteries*[1] case, the point raised by the defendants was "whether the Government must prove that the prices fixed were in themselves unreasonable" (Brief of United States, p. 13). The Court decided that the Sherman Law was enacted to protect the public from the evils of monopoly and price control; that the power to fix prices involves power to control the market and fix unreasonable prices; *that the Government and the courts were not to be burdened with the impossible task of ascertaining from day to day whether prices in each of the lines of commerce are unreasonably high;* and that, therefore, as the absence of a court determination of the reasonableness of the prices fixed by the combination in effect leaves the reasonableness of the prices in the hands of the combination, a price fixing combination of those controlling in any substantial manner a line of interstate commerce must be held illegal.

The Court said (p. 397):

> "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. * * * we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—*a determination which can be satis-*

[1] *United States* v. *Trenton Potteries Co.*, 273 U. S. 392.

factorily made only after a complete survey of our economic organization and a choice between rival philosophies."

In short, the foregoing decision merely restated the well settled rule that the dominant forces in an industry may not agree to fix or maintain prices, even though the defendants seek to show that they were reasonable prices. *This is not so because the rule of legal reasonable restraints does not operate in this situation, but for an entirely different reason; that it is impracticable for a court, each time a price fixing agreement is questioned, to go into the enormously complicated problem of what is a reasonable price for each article involved, and that it is unfair to place such a burden on the Government.*

Judge Rose in *U. S.* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172, pointed this out clearly (p. 181):

> "In each particular case upon the evidence submitted the courts must say whether the prices asked are or are not reasonable. It would not be an easy task. Some standard of reasonableness would have to be worked out. The factors to be taken into account would be numerous and complex. The labor and expense of finding out what all the relevant facts were would be enormous. After all was done and said, the margin of doubt would usually remain large. If the dealers were bound to show affirmatively that their prices were reasonable, the government would usually win. If the government had to show that they were unreasonably high; it would ordinarily lose."

The same thought was expressed by the Court in the early *Railroad Association* cases that to permit a *rate fixing* combination to exist, subject only to an attack upon

the reasonableness of the rates fixed, would be to leave the question of reasonableness to the combination itself, owing to the impracticability of a plaintiff's assuming the burden of proving unreasonableness of the rate. Upon this point the Court in the *Trans-Missouri* case (*U. S.* v. *Trans-Missouri Freight Association* (1897), 166 U. S. 290) said (p. 332):

> "* * * any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. *To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tends simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.*"

The effect of the price fixing cases is, then, that it is impracticable for the issue of the reasonableness of the prices fixed to be tried and constantly retried by the courts. This necessitates the holding that a combination to fix prices must not be allowed to exist at all, if evils attendant upon the power to fix prices are to be eliminated. This, of course, is no holding that as to practices other than price fixing the Court will not apply the test of reasonableness in determining their legality.

The opinion in the *Appalachian Coals*[1a] case substantiates the foregoing interpretation of the price-fixing cases (p. 374 of 288 U. S.):

[1a] *Appalachian Coals, Inc. v. United States* (1933), 288 U. S. 344.

"Decisions cited in support of a contrary view were addressed to very different circumstances from those presented here. They dealt with combinations which on the particular facts were found to impose *unreasonable* restraints through the suppression of competition, and in actual operation had that effect. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377; *United States* v. *American Linseed Oil Co.,* 262 U. S. 371. Compare *Maple Flooring Association* v. *United States, supra,* at pp. 579-582. * * * In *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, defendants, who controlled 82 per cent of the business of manufacturing and distributing vitreous pottery in the United States, had combined to fix prices. It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that the power to fix prices involved 'power to control the market and to fix arbitrary and unreasonable prices,' and that in such a case the difference between legal and illegal conduct could not 'depend upon so uncertain a test' as whether the prices actually fixed were reasonable,—a determination which could 'be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.' * * *"

II. The Hardwood[2] Case

This case was heard in the lower court on the bill, answer and affidavits, on an application for a preliminary injunction. The final decree was entered by stipulation, without trial, following the order for the preliminary injunction. The lower court in its opinion (263 Fed. 147) sets out a long list of "overt acts" which it says (p. 150)

[2] *American Column & Lumber Co.* v. *United States,* 257 U. S. 377.

were substantially admitted in the answer and not controverted in the defendants' affidavits (p. 151). In the language of the lower court these overt acts, admitted by the defendants, included the following (pp. 149-150):

> "* * * printing and causing to be distributed amongst the defendants *recommendations to make oral agreements at such meetings to eliminate competition amongst these defendants* who had been competing, * * * by distributing amongst the defendants *printed recommendations to discuss prices at their monthly meetings,* and orally discussing at such monthly meetings said stock reports, production reports, and sales reports, so as to produce at each of such meetings *a mutual exchange of oral statements of approval of high prices reported in the sales reports, as assurances that the defendants would further sustain such prices by maintaining prices as high as or higher than such prices;* by mutually exchanging each month through the manager of statistics, in connection with the production reports, *written predictions by the several defendants that high prices reported in the sales reports would continue to be maintained and enhanced, so as to thus furnish further assurance that the action of each defendant in maintaining and enhancing such price would be supported by like action on the part of other members of the plan;* * * * the manager of statistics edited these answers and caused to be distributed amongst the members such parts of them *as tended to show that it was successful in producing a steady advance in the prices of their products;* by printing and causing to be distributed among the defendants *arguments against low prices,* on the ground of *shortage of lumber disclosed by the stock reports,* and explaining how the disclosure of such shortage in the stock reports *prevented*

prices from being lowered, followed by arguments for still higher prices on the ground of the shortage disclosed; the continued co-operation to secure higher prices on the ground of shortage in stocks, and the elimination of competition; by causing to be reprinted with approval, and distributed amongst themselves, statements emphasizing the advance of prices following the shortage of lumber, and *urging the defendants against increasing production by night work, which would in effect 'kill the goose that laid the golden eggs' and would be criminal folly,* coupled with the suggestion made in the sales report that their combination or association, called the 'open competition plan,' to maintain and enhance prices would not be prosecuted, *that prices would continue to advance so long as the shortage of lumber was maintained,* and that the Sherman Law, designed to prevent the restraint of trade, should be repealed."

The record in the case contains a great mass of affidavits and exhibits showing that the central purpose and dominating activity of the so-called "Open Competition Plan" of the defendants was a systematic campaign of oral and written propaganda to cut down production and raise prices. The lower court in its opinion reviews some of the significant evidence on that point, and after showing the elaborate scheme whereby the defendants constantly exhorted each other to curtail their production and increase their prices, the Court proceeds to its conclusion, which it states as follows (p. 155):

"There is much other documentary evidence to like effect, but this is enough to indicate the common note running through it all, *and that common note is 'increase of prices.'* It is difficult, if not impossible,

on this record, to escape the conclusion that the purpose and intention of the plan *was to suppress competition among its members,* and create and perpetuate a condition in the hardwood lumber manufacturing business, *wherein the production of hardwood lumber was to be kept low enough to maintain prices on an ascending scale,* but not so low as to drive prices to such heights, under the stimulating influence produced by the propaganda to 'Build Now', that consumers would be induced to use substitutes. These two objectives mark the margins of the channel through which the members of the plan conducted by its manager of statistics, Mr. Gadd, were to steer interstate commerce in hardwood lumber, *and through which it was successfully steered, on up to the filing of this bill, until prices of hardwood lumber had increased from 150 to 250 per cent. within a period of 12 months."*

The Court was careful to point out that a combination among competitors is not necessarily unlawful, and that "each case must be determined on its own facts". Upon the record before it, the trial court says there was price fixing and an actual destruction of competition, and the *plan as actually operated* was illegal (p. 156):

> "It would serve no useful purpose to analyze the evidence, or to enter into a discussion of the decided cases, which have heretofore arisen under the Sherman Act; each case must be determined upon its own facts, and if these facts establish the proposition that the combination entered into unreasonably restrains trade in interstate commerce, by suppressing competition in prices, it falls within the condemnation of the act. Competition and co-operation by and with those engaged in the same business is not necessarily inconsistent. Successful business

> will likely result from a proper balance of the two, but too much of either may lead to disaster. *Competition without co-operation means destructive competition. Co-operation without competition means the destruction of competition—price fixing.* The latter is the state of the open competition plan, as disclosed on this record."

The decision of the lower court was based entirely on its finding that the defendants had "fixed prices and destroyed competition" by conducting an elaborate campaign of written and oral exhortation among its members whereby they had been induced to unite in curtailing their production and in raising their prices from 150 to 250 per cent. within a period of one year.

The decision of this Court affirming that of the lower court is based on this same ground (257 U. S. 377). The Court first sets out in great detail the various steps in the scheme of propaganda whereby the officers and members of the association brought to bear upon each other their arguments and persuasions to curtail production and increase prices. Summarizing the scheme, the Court says (pp. 398-399):

> "Third. The 'Plan' provided for a monthly 'market report letter' to go to all members of the association. In practice this market report letter was prepared by F. R. Gadd, Manager of Statistics, but his review of the market and forecast for the future were contained, almost from the beginning, not only in these market letters but also in the weekly sales reports, so that they were sent out to all of the members nineteen times between February 1 and December 6, 1919, and they were discussed at all but one or two of the forty-nine meetings which

were held. *All the activities of the 'Plan' plainly culminated in the counsels contained in these letters and reports.*

"This elaborate plan for the interchange of reports does not simply supply to each member the amount of stock held, the sales made and the prices received, by every other member of the group, thereby furnishing the data for judging the market, on the basis of supply and demand and current prices. It goes much farther. It not only furnishes such information, with respect to stock, sales and prices, but also reports, giving the views of each member as to *'market conditions for the next few months'; what the production of each will be for the next 'two months';* frequent analyses of the reports by an expert, with, we shall see, *significant suggestions as to both future prices and production;* and opportunities for future meetings for the interchange of views, which the record shows were very important. It is plain that *the only element lacking* in this scheme to make it a familiar type of the competition suppressing organization *is a definite agreement as to production and prices."*

The Court then goes on to develop further details of the scheme by which the conspiracy was carried out, and sums up the result as follows (p. 402):

"* * * we find that beginning within a month of the consolidation of the two associations, the members of the 'Plan' *began actively to coöperate, through the meetings, to suppress competition by restricting production.* This is very clearly shown by the excerpts following from the minutes of meetings and from the market letters and sales reports distributed at them."

The Court then sets out a long series of such excerpts from the oral discussions and the market letters, from which we quote a few of those italicized by the Court, as follows (pp. 402-403):

> " 'If there is *no increase in production*, particularly in oak, there is going to be good business.' * * * *'No man is safe in increasing his production.* If he does, he will be in bad shape, as the demand won't come.' * * *
>
> " * * * 'we are confronted with the possibility of killing the goose that laid the golden egg. *Overproduction will spell disaster.*' * * *
>
> " *'The danger which we see lurking in the future for the lumber industry is overproduction.* * * * *Overproduction* has always been the curse of the lumber industry in America. * * * It would be criminal folly, therefore, for the lumber manufacturers to indulge themselves in any such form of commercial suicide.' "

Here the Court sets out another long series of excerpts from the market letters distributed to the members, from which we quote some of the significant extracts as italicized by the Court (pp. 405-407):

> "As thus, in the stock report of March 8, 1919, after pointing out that the stock at the mills was only about three-fourths normal and that the production in the Memphis group of manufacturers was only fifty-six per cent. of normal, the letter of the Manager of Statistics continues:
>
> > " 'There has of course been a long drawn out and desperate effort to break the hardwood market by a withdrawal of demand; but be it said to the eternal credit of the hardwood producers that *they have maintained a stout heart and stiff*

backbone; with the result that there has been exhibited a strength in the market which has been little short of remarkable in the face of the light demand, and the vigorous efforts which have been steadily made *to hammer down prices.* * * *

" 'With this information before him it is difficult to see how any intelligent hardwood manufacturer can entertain any hesitation as to *the proper course for him to pursue* in selling his lumber.' * * *

"Again, three weeks later, in the market letter of March 29th, after stating that stocks had further decreased from the previous month, with a production not to exceed fifty per cent. of normal, the Manager of Statistics of the 'Plan' adds:

" 'Naturally the situation ought to have an important bearing on the plans of every hardwood lumberman. If the facts were better understood *offers of business now at shaded prices would get scant consideration* and there would not only be *no good reason to cut prices,* but there would be every reason why they should be held at reasonable profit-making levels * * * All conditions indicate a firm market for the balance of the year, with prices moving upward.'

"Another month later, in the market letter of April 26th, this influential agent of the association, after pointing out that stocks were less than seventy-five per cent. of normal, that production was about sixty per cent. of normal, and that the demand was far in excess of the supply, adds:

" 'If ever there was a time when rich rewards awaited the producer of hardwood lumber, now is that time. *There are glorious oppor-*

tunities ahead. * * * Supply and demand must necessarily govern prices. The demand is with us, the supply inadequate, therefore, *values must increase, as our competition in hardwoods is only among ourselves.'*

"Again, in another month, May 24th, in his market letter, the Manager of Statistics, after stating that production during the month of April was sixty-five per cent. of normal and that a careful estimate indicated that there would be no material increase in May and June, says:

" 'If anyone tells you that lumber prices are coming down, call their attention to the following: *Curtailed production of mills;* stocks at mill points are below normal; * * * *necessity* on the part of lumber operators *of maintaining a price level that will enable them to make a reasonable profit.'* * * *

" 'The tendency of the market is upward and will undoubtedly continue to advance as long as sales and production bear their present relation to each other.'

"Again on September 20th, in his market letter, he says:

" 'It has been rumored that a certain class of buyers, believing that the price of lumber was too high and that the temporary inactivity in the export market offered the opportune moment, have agreed to confine purchases to actual immediate requirements during the next sixty days. This is not going to worry the manufacturers very much; in fact, it will give them a much needed breathing spell and an opportunity to accumulate a supply of dry stocks which, in our opinion, is the same as gold dollars in the bank. * * *

> " 'Those who have been looking for lower prices overlook the very important factors: that production continues below normal * * * that unsold stocks at mills are 70 per cent. below normal; * * * that the export demand has just started, * * *.
>
> " 'With these conditions prevailing, there is *nothing in the situation that should encourage anyone to hope for a drop in quotations.*' "

After quoting these excerpts and making a further review of the detailed steps in the scheme, the Court states its conclusion as follows (pp. 407, 409):

> "To this we must add that constantly throughout the minutes of the various meetings there is shown discussion of the stock and production reports in which the shortage of supply was continually emphasized, with the implication, not disguised, *that higher prices must result.* Men in general are so easily persuaded to do that which will obviously prove profitable that this reiterated opinion from the analyst of their association, with all obtainable data before him, that higher prices were justified and could easily be obtained, must, inevitably have resulted, *as it did result, in concert of action in demanding them.*
>
> "But not only does the record thus show a persistent purpose to encourage members *to unite in pressing for higher and higher prices, without regard to cost,* but there are many admissions by members, not only that this was the purpose of the 'Plan', but that it was fully realized.
>
> "These quotations are sufficient to show beyond discussion that the purpose of the organization and especially of the frequent meetings was *to bring about a concerted effort to raise prices regardless of cost or merit,* and so was unlawful, and that the

members were soon entirely satisfied that the 'Plan' was 'carrying out the purpose for which it was intended'.

"As to the price conditions during the year. Without going into detail the record shows that the prices of the grades of hardwood in most general use *were increased to an unprecedented extent during the year*. Thus, the increases in prices of varieties of oak, range from 33.3% to 296% during the year; of gum, 60% to 343%, and of ash, from 55% to 181%. * * * we cannot but agree with the members of the 'Plan' themselves, as we have quoted them, and with the District Court in the conclusion that the united action of this large and influential membership of dealers contributed greatly to this extraordinary price increase."

The Court then digresses somewhat from its main theme, to point out that it was false and misleading to claim that this "Plan" was "Open Competition". The evidence as previously detailed by the Court (pp. 394-395) showed that the members were required, in addition to the usual statistical reports, to make daily reports to the association of all sales, with the name and address of each purchaser and with exact copies of all orders and invoices. They were also required to submit their stocks and books to the inspection and audit of the association. Commenting upon these features of the "Plan" and how they were employed to aid the common propaganda to restrict production and increase prices, the Court says (p. 410):

"To call the activities of the defendants, as they are proved in this record, an 'Open Competition Plan' of action is plainly a misleading misnomer.

"Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their

> business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a 'harmonized' estimate of the market as it is *and as, in his specially and confidentially informed judgment, it promises to be.* This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together *and pursue a common purpose under a common guide* that, *if it did not stand confessed* a combination *to restrict production and increase prices* in interstate commerce and as, therefore, a direct restraint upon that commerce, *as we have seen that it is,* that conclusion must inevitably have been inferred from the facts which were proved."

The reports were not sent to buyers or to the trade generally, nor were they given any prompt or general publicity, though some of them were filed in Washington, and the Court held that the "Plan" could not be called "Open Competition" merely "because the meetings were *nominally* open to the public, or because some voluminous reports were transmitted to the Department of Justice".

Summing up its brief comments on this phase of the evidence, the Court says (p. 411):

> "In the presence of this record it is futile to argue that the purpose of the 'Plan' was simply to furnish those engaged in this industry, with widely scattered units, the equivalent of such information as is contained in the newspaper and government publications with respect to the market for commodities sold on boards of trade or stock exchanges.

> *One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only; and another is that there is no skilled interpreter of the published reports, such as we have in this case, to insistently recommend harmony of action likely to prove profitable in proportion as it is unitedly pursued."*

The observation in the last part of the foregoing sentence brings the Court back to its main theme, upon which it bases its final conclusion in the case, as follows (pp. 411-412):

> "Convinced, as we are, that the purpose and effect of the activities of the 'Open Competition Plan', here under discussion, were to restrict competition and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber *by concerted action in curtailing production and in increasing prices,* we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Anti-Trust Act of 1890 (26 Stat. 209) and the decree of that court must be
>
> *Affirmed."*

On such a record, it is not surprising that a majority of the Court came to the conclusion that the elaborate scheme of organized propaganda for decreased production and increased prices conducted by the defendants had the purpose and effect of unlawfully suppressing competition.

III. Reporting Plan in Linseed[3] Case

"DAILY MARKET INFORMATION.—The undersigned and each 'subscriber' hereto agrees:

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[3] *United States* v. *American Linseed Oil Co.*, 262 U. S. 371.

"(a) To immediately, and when and as hereafter issued, deposit with the 'bureau' all published price lists of the undersigned covering raw and boiled linseed oil, cake and meal;

"(b) Also to report to the 'bureau' by prepaid telegraph, and further confirm by mail, duplicate of all *quotations* made at variance with above price lists, giving *better terms* to the contemplated purchaser than those quoted;

"(c) With all reports made in compliance with the above paragraph 'b' of quotations which amount to one carload or more of oil, cake or meal there shall also be reported at the same time and in the same manner *the prospective buyer's name, address,* and f. o. b. point of shipment;

"(d) In so far as the above reports 'a', 'b', and 'c' do not disclose the following, the undersigned 'subscriber' agrees to give the following information in connection therewith, that is: *the exact prices, terms, and discounts*—and whether made to jobber, dealer, or consumer—and in what quantities, carload or less than carload, and warehouse or mill prices;

"(e) Also to *promptly report all changes* in and alterations or withdrawals of the above, of every kind whatsoever, that may be made;

"(f) Also to promptly report by prepaid telegraph, and further confirm by mail, all orders received by the undersigned 'subscriber' in response to special quotations made as above provided in paragraph 'c' designating the quotation which is the basis of such order and any variance therefrom. * * *

"All of the foregoing market information as received by the 'bureau' *will be promptly cleared and relayed by it to the undersigned 'subscriber' and to all other 'subscribers' in good standing.*

"SPECIAL MARKET INFORMATION.—Any 'subscriber' who has made offerings or quotations to a prospective buyer *and is advised by such buyer that it is not to be awarded such business* shall have the right to immediately advise the 'bureau' of such unsuccessful offering or quotation *giving all details of such bid or offering,* and may then request the 'bureau' to bulletin all of its 'subscribers' asking *specific information regarding any quotation or sale* to such prospective buyer by any of the other 'subscribers' and the 'bureau', on receipt of such request, *will immediately bulletin all 'subscribers' asking therefor* and on receipt of replies *will send out a compilation report thereof to all 'subscribers',* together with the details of sale, if such a sale has been reported, so that all 'subscribers', including the original inquirer, will have a complete report of this transaction.

"On receipt of a request for such specific information from the 'bureau', the undersigned 'subscriber' will immediately reply to same giving full information as to any quotation or sale which it may have made to such a buyer and, if it has made none, so report."

IV. The Cement[4] Case

The Cement Association embraced nineteen defendant companies producing approximately 95% of the cement in the northeastern section of the United States, where this Association operated. The Government charged that the purpose and effect of its organization was to control the price and production of cement in the entire market area where its members sold their product, and that as a result of that control the defendants had made enormous and

[4] *Cement Mfrs. Ass'n.* v. *U. S.*, 268 U. S. 588.

exorbitant earnings and profits and had increased the price of cement, during the two years following the War, to an amount which was more than four times the price fixed by the Government during the War, the Government price itself having been higher than any prices which had been obtained at any time during the period of fifteen years preceding the War. The defendants denied that this increase in prices had been due to any control exercised by them over prices or production, and while they admitted that the net earnings of some of the companies during the Association operations in 1920 had amounted to as high as 21% return on investment, they claimed that such high returns were exceptional and that some of the companies had in fact lost money, and that the average return of the defendant companies in that year was only a little more than 5% on invested capital.

The principal controversies in the case centered about the following issues:

(1) *Specific job contracts.* Under these contracts the manufacturers sold cement to contractors or dealers ostensibly for use in construction work on a specific job. By the long-established custom of the trade, the contracts amounted to options to the purchasers, who had the right, but were not obligated, to buy the amount of cement specified in the contract at the contract price. The seller, however, was obligated to sell and deliver the amount of cement called for in the contract for use on the job specified. Before the organization of the defendant Association, it had been the common practice of contractors and dealers to make these specific job contracts with manufacturers for many times the amount of cement required on the specific jobs named in the contracts. They thereby acquired a

guaranty against an increase in price, not only for the cement required on the specific job, but for as much additional cement as the manufacturers would deliver under the outstanding contracts. Under the stress of competition before the Association was organized, the manufacturers had made a general practice of delivering all of the cement called for by these contracts, whether to be used on the specified job or not. Their position was that while they had the technical right to *refuse* to deliver more than the amount required for the specific job, such refusal would result in the curtailment of their sales and would incur the ill will of the contractor or dealer, and they therefore elected to make the deliveries in order to preserve their competitive position in the market. Since the contractors and dealers bidding on a given job customarily made these contracts with several different manufacturers, each contract calling for the full amount or more than the full amount required on the given job, any manufacturer who might refuse to fill his contract because the cement was not to be used on the given job would thereby, in effect, be renouncing a sale already negotiated and thus withdrawing from that market in favor of his competitors who were not so particular about the use made of their cement.

As a result of the general competitive practice of the manufacturers in fulfilling these padded and duplicated contracts in periods of rising prices, there was brought into the market at such times a large quantity of so-called "free" cement. Since it had been purchased by the contractors and dealers at a price lower than the manufacturers' current selling price, it could be sold at a profit by the contractor or dealer at the same price the manufacturers were offering, and its presence in the market tended to prevent any fur-

ther increase in the manufacturers' price. This situation was naturally distasteful to the manufacturers, and one of the principal objects of the organization of the Association was to correct it.

In order to correct it, the Association set up an elaborate system of reports and espionage covering specific job contracts. Every manufacturer was required to report to the Association daily full details of each specific job contract made that day, giving the date of the contract, date of termination, name of contractor, full description and location of work, quantity sold, *the price,* quantity delivered to date, balance to be shipped, etc. The daily reports also included all changes in and cancellations of specific job contracts theretofore made, with all deliveries made under such contracts, and the balance of deliveries remaining to be made. This information was tabulated and relayed by the Association to all of the members, and the Government charged and the trial court found that the members were required to keep the information strictly confidential, guarding it carefully in their own organizations from the knowledge of anyone except the necessary executives, and withholding it from contractors, dealers and the trade.

In order to make effective use of this information, checkers (called "spies" by the Government) were sent out to investigate all contracts where padding or duplication was suspected. These checkers worked in secret, getting access to jobs, records and warehouses and collecting information in whatever way they found necessary. Their activities embraced substantially everything charged by the Government against the Sugar Institute investigators. In 1920, these investigations had increased to nearly 300 per month, and in that year, of the contracts investi-

gated, 1,392 contracts were found to be "padded" to the extent of more than 3,500,000 barrels of cement, and 978 of these contracts were partially cancelled, to the extent of 2,014,653 barrels.

The defendants contended that these reports and investigations were necessary in order to protect them against the misrepresentations and frauds of the contractors and dealers in padding and duplicating specific job contracts, because the individual manufacturers, under the competitive conditions prevailing before the Association was organized, either could not or would not detect such abuses and protect themselves by enforcing the contracts according to their terms. The Government claimed that this was only camouflage, and that the whole purpose and effect of these reports and investigations was to do away with the type of legitimate competition which had existed in the industry under specific job contracts before the organization of the Association. It was the Government's position that these contracts gave the trade options on a large volume of cement, which under free competitive conditions the defendants had always permitted the trade to exercise, thus protecting the trade against unwarranted increases in price by the manufacturers, and that the activities of the Association were designed to stop this type of competition by providing each manufacturer with full information about his competitors' specific job contracts and enabling them to combine against the buyers in revoking the options they had formerly allowed to be exercised. Upon this issue the lower court found with the Government, making the following observations in its opinion about the activities of the Association in this connection [294 Fed. 390 (1923) at pp. 397-398].

"The care manifested in this regard brings me to a consideration of the practice under which manufacturers protected themselves against the diversion and 'misuse' of cement under specific job contracts. Only under such contracts is there any obligation upon a manufacturer to deliver cement at a specific price over any extended period of the future. There was accordingly great effort to see that no specific job cement was diverted and used otherwise. *If so, it might enter into competition with cement thereafter sold by the company at then current prices.* Then, too, if more than one person, say a contractor putting in a bid for work, had covered himself for the quantity of cement necessary for a certain specific job, and thereafter did not obtain the contract for the work, the manufacturers were desirous that such contract be canceled, lest it confuse their estimate of outstanding commitments, and also that the cement thus contracted for, if delivery should be asked, *should not affect a later market.* * * *

"* * * In order to protect the manufacturers against any alleged misuse or diversion of cement, the Association employed a force of checkers or auditors. These men were familiar with building construction, and it was their duty to investigate specific job contracts, to ascertain what contractor had secured a particular work, the amount of cement that probably would be used in the work, and whether any cement obtained for such work was being used for other purposes. Upon obtaining the report of the checker, the Association would communicate the same to the manufacturers and such of them as had specific job contracts with persons who were not actually to furnish cement to the job would cancel. Also, if the estimate of the amount of cement to be used seemed excessive, a reduction in the requirements of the contract would generally

take place. The action of the companies canceling or reducing commitments would at once be made known to each of the others. Upon one occasion, cancellation amounted to no more than one-fourth of a barrel of cement.

"Of course, if a company wished to recognize an agreement made with a contractor or person who had expected to supply cement to a specific job, and who did not get the work, but was willing to take the cement, notwithstanding, it might do so. But my distinct impression is that one of the prime reasons for exercising such strict supervision over specific job work, and in reporting the cancellation of infinitesimal quantities of cement, was to exert a moral compulsion upon a company, which was inclined to recognize a contract such as I have just referred to, and to make assurance doubly sure that over any future time there would be no 'free' cement."

This conclusion of the lower court was based on a great mass of testimony and exhibits introduced by the Government, designed to show that there was definite concert and co-operation among the competitors in the cancellation of padded and duplicated contracts. For example, we quote from the Government's brief in this Court in the *Cement* case, setting out some of this evidence (pp. 107-109):

"* * * And the willingness of the members to cancel contracts is shown by some of the discussions which occurred in their meetings, and by communications and reports made to the Association. Thus, in the meeting on March 20, 1916, appears the following:

"Mr. Swett (Lehigh): Certainly. For instance, if I have a contract for one thousand bar-

rels of cement and the secretary calls my attention to this contract stating that he believes that it is a duplication and not a bona fide contract and I, upon investigation find that such is the case, I cancel the contract and I so advise the secretary and then the secretary in turn advises all the members of the action that I have taken.

"The President (Giant): *Some of them don't seem to want to cancel some of these contracts.*

"Mr. Swett: *That is the trouble, that is what I am trying to bring out. I am not making any complaint about the manufacturers that do take steps to investigate their contracts, it is those that do not take steps to investigate their own contracts.* The fact that any competitor of mine called my attention to a contract that did not look quite right or the proper way, I would say now that I would not stop at any expense to investigate it thoroughly. If the contract was so, that I found the contract was not proper, I would take steps to cancel it. *I think we should all do likewise if we want to get anywhere. That is the purpose of this Association.*

"The discussion was further extended when the following occurred:

"Mr. Erdell (Penn-Allen): *I think without doubt that very shortly one or the other of the companies will cancel their contract. We have all said that between ourselves,* and as soon as Mr. Griffith raised the question this month and wanted to have the thing cancelled before the end of the month, *I took it up very vigorously to see if there was not some arrangement could be made and either one or the other cancelled it.* If our cement does not go on the job, I shall cancel our contract immediately.

"The President: *That is the spirit, gentlemen. That is the way to do it.*

"Mr. Erdell: *I will tell you what we will do, we will cancel our contract as far as it comes here it ceases, it goes off of there.*

"Mr. Swett: Let it stay on, it would be better.

"Mr. Gilkyson (Phoenix): *It is entirely up to the Association.*

"The President: *It is the understanding that who ever gets the job, the other will cancel.*

"Mr. Gilkyson: The only danger I see on that particular job is that this cement is asked for through a dealer; *and I am afraid that dealer will misuse some of that cement; if it is left up to him.*

"On March 17, 1916, the sales manager of the Vulcanite Company wrote the Association requesting that several contracts of the Dexter Portland Cement Company for the delivery of quantities of cement at Manchester, Connecticut, be investigated and closed his letter with the following paragraph:

"'All of these should be canceled in order that the manufacturer may be protected *and the market of Manchester and South Manchester not disturbed.*'"

But this type of evidence and argument to support a charge of conspiracy in restraint of trade (the exact kind of evidence and argument which mainly constitutes the Government's case at bar) did not impress this Court. After reviewing the activities constituting the alleged conspiracy to control market supplies and prices through the system of reports and espionage and moral compulsion on specific job contracts, this Court said (pp. 603-604):

"* * * That a consequence of the gathering and dissemination of information with respect to the specific job contracts was to afford to manufacturers of cement, opportunity and grounds for refusing deliveries of cement which the contractors were not entitled to call for—*an opportunity of which manufacturers were prompt to avail themselves*—is also not open to dispute. We do not see, however, in the activity of the defendants with respect to specific job contracts any basis for the contention that they constitute an unlawful restraint of commerce. The Government does not rely on *any agreement or understanding* among members of the Association that members would either make use of the specific job contract, or that they would refuse to deliver 'excess' cement under specific job contracts. Members were left free to use this type of contract and to make such deliveries or not as they chose, and the evidence already referred to shows that in 1920 padded specific job contracts were cut down something less than two-thirds of the total amount of the padding, as a result of the system of gathering and reporting this information. It may be assumed, however, if manufacturers take the precaution to draw their sales contracts in such form that they are not to be required to deliver cement not needed for the specific jobs described in these contracts, that they would, to a considerable extent, decline to make deliveries, upon receiving information showing that the deliveries claimed were not called for by the contracts. Unless the provisions in the contract are waived by the manufacturer, demand for and receipt of such deliveries by the contractor would be a fraud on the manufacturer; and, in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act

upon or not as they choose, can not be held to be an unlawful restraint upon commerce, *even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound.*"

We here see this Court definitely upholding the right of competitors to cooperate to protect themselves against imposition, misrepresentation and fraud, even though they thereby concertedly restrict a type of competition which they had long practiced and which was not shown to be in any way harmful to the public. This decision was inevitable, in view of the now settled policy of the Court to uphold restraints of competition which have a reasonable basis, and this application of that policy was not anywhere near as radical as in the *Chicago Board of Trade* case, where the Court sustained an *express agreement* of all the competitors in the market *to eliminate completely a long-established type of competition,* not because it involved imposition or fraud upon themselves or others, and not because it was shown to be harmful or destructive competition, but because it was shown not to be as wholesome and beneficial as the type of competition which was substituted for it by agreement of the competitors.

(2) *Uniform delivered prices.* The second major controversy in the *Cement* case arose out of the uniform delivered prices maintained after the organization of the defendant Association. The Government charged that, in addition to eliminating the former competition of "free" cement under specific job contracts, the defendants had concertedly maintained uniform non-competitive prices on all cement, through their system of daily price and sales

reports, through the reporting of production, deliveries and stocks on hand, and through their concerted refusal to ship f. o. b. factory and their concerted practice of making all sales on a delivered price basis, uniform delivered prices being arrived at by using uniform mill prices and uniform freight applications from arbitrary basing points, the freight applications being contained in freight books compiled and distributed by the Association from time to time for the use of its members only. In support of these contentions, the Government introduced a great mass of evidence showing absolute uniformity of price prevailing after the organization of the defendant Association. It also introduced a long line of evidence designed to show how the price and other information and the freight rate books were concertedly used to bring about uniform delivered prices.

The close parallel between the type of evidence and argument relied on by the Government to sustain these contentions in the *Cement* case and its similar contentions in the case at bar is shown by the following excerpts from the Government's Supreme Court brief in the *Cement* case (pp. 89-92; 111-127):

> "The forms above quoted and described show that each member had continually in his possession every detail of its competitors' business, in so far as it related to production of clinker and cement, shipments of cement, the quantity under contract for delivery in the future, and when, where, to whom, *and at what price* it was to be delivered. * * * The price certainly has nothing to do with the identification of a job unless they all agree to charge the same price for cement delivered at the same place. But the excuse for requiring the price to be reported is thus stated in the constitution:

"'The second form of misrepresentation is illustrated by the common experience of every manufacturer of Portland cement with statements made to him *not only by dealers but often by his own salesmen* concerning competitor's practices, with the result that the manufacturer is deceived and imposed upon.'

In other words, *the manufacturers' dealers, and even their own salesmen, are of such character that they cannot be believed;* and to protect themselves against misrepresentations by them as to members' prices and practices the manufacturers must combine *and tell each other what their prices are. This same excuse is offered by all associations which practice an exchange of prices.* It is based on the assumption that the members of the Association are immaculate while those with whom they deal are dishonest. * * * *But the real object of the confidential exchange of prices at which sales are made is that, through the moral effect of such knowledge, the prices may be enhanced when the market is favorable and maintained when unfavorable* * * *.

"Like all other 'open-price' associations, this one adopted an easy method, and a very efficient one, of figuring in the freight to ascertain the delivered price at every point where a delivery would be likely to be made.

"The price paid for a barrel of cement consists of three main elements: (1) The price at the mill, (2) the price of the bags, and (3) the freight charges. *The evidence shows that the price of cement sold by all companies for delivery to the same point at the same time was made up of the same base or mill price, the same charge for bags, and the same charge for freight, regardless of the point from which the shipment was actually made. Uniformity of price was the inevitable result.* * * *

"The freight-books published by the Association were used in making prices *and were intended solely for the use of members.*

"A memorandum exchanged between officials of the Atlas Company, under date of March 1, 1916, contained this statement *which conclusively shows that it was the understanding that the figures appearing in those rate books were to be used by the members in making prices for quotations:*

> " 'On Friday, February 25th, we received freight rate books for all the Eastern territory, including Ohio.
>
> " *'These books, as I understand it, are to be used in making prices, whether the rates are correct or not.'*

This memorandum appears to have been sent the Association, and to have passed into the hands of the other members, * * *

"* * * That these books were for the members alone, and that they could be used by dealers in a way to disturb the market, is shown by remarks made in the meeting of March 20, 1916. Mr. Twamley (Coplay) had incidentally remarked that he had received requests for books from customers, which called forth the following discussion:

> "Mr. Dutton (Bath): One moment, may I have a moment before you put that question? I would like to say, that as far as giving books to customers for them to use to figure freight rates on, *I would like to ask whether that is not a dangerous practice? * * * which may be a means of causing disturbances at different times on our quotations.* We have a lot of inquiries about them, and I have always turned them down, I have not let any of them get outside of our own company.

"The President (Giant): I think you are right.

"Mr. Swett (Lehigh): I don't think the customer should have the use of these freight books.

"Mr. Weaver (Allentown): I don't think so either.

"The President: It is a matter for the Association members, and not for the customer.

"Mr. Dutton: That is what I believe.

"The President: I don't think these books are made up for distribution among the customers of any company, it is for the use of the members of the Association solely, and their different branches.

"Mr. Dutton: I might simply say this, all this was brought home sharply to me; *about a year ago I was requested by a dealer in Baltimore for a freight rate book,* and before I gave it any thought, *I sent him one,* and it was but a short time before I learned that he was making prices at different points down on the eastern shore there, *and he had those freight rate books which he was using to upset the business that we had with the different dealers,* and it all started from letting him have one of those freight books.

"The President: I think this information should be kept for the members of the Association, and not for its customers. * * *

"In August, 1920, the Knickerbocker Company transmitted to one of its salesmen a list of corrections furnished by the Association to be made in a certain freight rate book, stating:

"* * * they are not absolutely correct, there will be another correction sheet sent you later.

However, these figures are to be used when quoting for new market business.

"The relation of the freight rate books to prices is further illustrated by the following excerpt from a letter relating to freight rates dated December 13, 1920, which passed between officials of the Knickerbocker Company, to wit.

> "As a matter of fact, I have learned, since returning from Boston, that there are about *four kinds of prices out. This difficulty will be overcome shortly I hope by the issuance of new freight rate books.*

That is, after the issuance of the new book, *there would be but one price.* * * *

> *"Notwithstanding the wide dispersion of the mills and the consequent difference in the freight rates, as will be hereafter shown, the prices at which cement is offered and sold by all defendants at the same point at the same time are almost invariably exactly uniform.* This is accomplished by making all offers and sales upon the basis that all cement sold at any particular destination is shipped from a single point; and, consequently, that a single freight rate applies; or, stated in another way, all defendants have the same price at the mill, and add the same freight rate from them all; and therefore charge a uniform price at the point of delivery. * * *
>
> "The members of the Association, without exception, make all sales f.o.b. point of delivery, requiring the purchaser to pay the freight and allowing him credit therefor when making payment of the invoice for the cement. * * *
>
> "To supplement this practice and to make more certain that cement could be obtained at

no destination except at the uniform prices made by defendant corporations, the contracts of all but three *exclude the buyer from control of shipments until arrival at destination,* yet place upon him all responsibility from the time shipments are delivered to the railroad company at the mill. * * *

"The above is one of many instances where the actual rates differed as much as 12 cents per barrel from the rate charged, the Association rate being based on the highest, and where the city of Reading paid the Allentown Company, which enjoyed the shortest haul, $564 more than it would have paid at the base price plus actual freight. *If competition existed amongst the defendants and if the basing point price fixing device were the development of competition, the Allentown Company would have been compelled to share with the purchasers of cement at Reading and the many points elsewhere similarly situated some part of this $564."*

This line of evidence and argument had produced the desired effect upon the mind of the lower court, as indicated in the following excerpts from its opinion (294 Fed. 390, at pp. 394-400):

"The freight rates books standing alone, and in so far as they merely record a compilation of lawful freight rates, are harmless. Their vice, if such it be, *resides in the fact that there is a concert of action upon the part of defendants in so using them that all prices quoted are for delivery at the point required by the purchaser, and that no cement will be sold in such manner as will permit a purchaser to take advantage of cheaper transportation charges than are required to be paid for the shipment of*

cement by rail. In extenuation of the practice, it is said that this method of marketing cement is a trade custom, which came into being before the formation of the association; that it results from the independent and uncontrolled action of each manufacturer, and is in no way to be attributed to agreement, or any activity, of the association. Very probably there is *no agreement now in force* by which such practice is to be followed. The custom, however, was at one time the subject of an *agreement* to which 13 of the corporate defendants were parties, viz. the 'Articles of Association of Licensed Cement Manufacturers,' dated June 30, 1909.

"Reverting to the exchange of statistics, in which the selling price of specific job contract cement is sold, it seems apparent that such quotation will also reveal the market prices for cement sold to dealers. The evidence is that upon a given day the price of cement to dealers is 10 cents less per barrel than that sold upon the same day to a consumer for use in a specific job. Each manufacturer is thus apprised of the amount being charged for cement for all purposes by its competitors. From reports of stock on hand, each member received, in effect, a forecast of his competitors' view of the immediate market, and, that there might be no misconception as to actual business being transacted by any one mill, the reports were careful to specify the amount of cement which one mill sometimes shipped for another. * * *

"The record, as I have said, contains much matter to indicate that at any given time the prices at which the various companies sold cement were uniform, and that, when one company did change its quotation, the other companies delayed but little in falling into line. * * * *since the association began to operate, there has been a uniformity and stability in such quotations that previously did not exist.*

"Competition, as commonly understood, includes the more material elements of prices and terms, especially, I should think, in the sale of a standardized commodity such as cement, where considerations as to the superiority of one brand over another have all but been eliminated. Prices, of course, will exhibit some tendency towards uniformity, in that even a necessitous seller will not make a more favorable price than competitive conditions force him to take; and it may be, as economists say, that prices for a standardized product will actually become uniform, and will remain so over substantial periods of time, where competitive conditions are perfect. *The fact is, however, that so long as there is a marked difference in production costs, in the financial necessities of manufacturers, in the location of mills as respects active markets, and there is less than a capacity production by all manufacturers who desire to sell cement, it is reasonably to be expected that there will be a difference in the inducements to be offered to prospective purchasers.* In the particulars just mentioned, the defendant corporations (*sic*) are not similarly situated, and, if such similarity be a prerequisite of perfect competition, there can be none in this industry. If, under truly competitive conditions, the prices should upon occasion become uniform, *I seriously doubt if they would long remain so.* Producers would not be content with a situation wherein the field of competition was limited to the personality of the salesman representing his own company and that of his rivals. * * *

"Counsel for defendants have argued that 'ignorance is not a virtue, and knowledge and information are not a crime.' The accuracy of the statement, as a general proposition, is not questioned, but ordinarily the sources of wisdom and of knowl-

edge are open to all interested persons upon more or less equal terms. *Here such was not the fact.* The situation in this respect, which here existed, was in the main the counterpart of that condemned in the *United States* v. *American Linseed Oil Co.*, 43 Sup. Ct. 607, 67 L. Ed. 1035, where it was said:

> " 'With intimate knowledge of the affairs of other producers, and * * * proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers, necessarily ignorant of the true conditions.'
>
> "* * * upon the whole, and without further discussion of the great mass of evidence which goes to make up this record, I think that real competitive effort tended to become more and more feeble, that manufacturers, by reason of the exchange of statistics, were equipped to regulate their production, and by common consent and a concert of action did so, to the end that the cement supply would at all times be a lap or two behind the demand, and thus created higher prices. In enabling this to be done, the association, its officers and agents, together with its membership, materially limited the full and free operation of the contending forces of competition, to which the public, under the Sherman Law (Comp. St. §§8820-8823, 8827-8830), is entitled, and unreasonably affected interstate trade and commerce."

But this Court did not follow the lower court in these inferences and conclusions as to the purposes and effect of the exchange of price and other information and the use of the freight rate books in establishing uniform prices. The Court, giving full credit to the testimony of the economists that competition under these conditions would produce uni-

formity of prices, stated its conclusions on these points as follows (pp. 604-606):

> "Nor, for the reasons stated, can we regard the gathering and reporting of information, through the co-operation of the defendants in this case, with reference to production, price of cement in actual closed specific job contracts and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price.
>
> "Agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful and may be enjoined, but the Government does not rely on any agreement or understanding for price maintenance. It relies rather upon the *necessary leveling effect* upon prices of knowledge disseminated among sellers as to some of the important factors which enter into price. *It is conceded that there is a substantial uniformity of price of cement. Variations of price by one manufacturer are usually promptly followed by like variation throughout the trade.* As already indicated, the larger proportion of the product of the defendants is distributed through dealers, and prices to dealers are not reported to or through the Association. It is contended by the Government that the report of prices on specific job contracts in effect informs the members of the Association of prices to dealers, since the differential allowed to dealers is well known in the trade. However this may be, the fact is that any change in quotation of price to dealers, promptly becomes well-known in the trade through reports of salesmen, agents and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in price, and uni-

formity has resulted not from maintaining the price at fixed levels, *but from the prompt meeting of changes in prices by competing sellers.*

"It is urged by the defendants that such uniformity of price as existed in the trade was due to competition. They offered much evidence tending to show complete independence of judgment and of action of defendants, by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. *A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition;* and the Government in its brief concedes that 'undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers.'

"We realize also that uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; *and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."*

(3) *Prior and collateral conspiracies and uniform terms and practices.* The other major contentions of the Government in the *Cement* case may be grouped together and reviewed very briefly. A great amount of evidence was introduced to support the following charges:

(a) Conspiracies among the defendants prior to the organization of the defendant Association to limit production and fix prices, these conspiracies leading up to and culminating in the formation of the defendant Association and continuing through that Association.

(b) Stripping the files of the defendant Association of damaging documents.

(c) Suppression of documents relating to the organization of the defendant Association.

(d) Blacklisting, in guise of exchange of credit information.

(e) Discussion of uniform terms and trade practices, and concert of action in putting them into effect, these terms and practices including allowances for the return of used bags, the amount of the cash discount on invoices and the date from which the discount should be figured, refusal to allow the discount when bills were paid by note, refusal to allow the discount when the customer had another past due account, limitation of credit terms to thirty days and the allowance of five cents a barrel discount for payment in ten days, and the imposition and reporting of extra bin charges.

The evidence supporting these charges occupied hundreds of pages of the record, and counsel for the Government devoted nearly 100 pages in their brief to arguments supporting them. Some of these charges were very strongly supported, notably those concerning the prior unlawful concerts and agreements leading up to the organization of the defendant Association, the stripping of the files of damaging documents, and the suppression of the papers relating to the organization of the defendant Association. No contradictory evidence at all was offered by the defendants on these last two points. The Government supported the remaining charges in this group with a large number of extracts from the correspondence of the defendants and the minutes of the meetings, its method being the same, though not carried to the same extremes of triviality and repetition, as that of the Government in the case at bar. Every expression from which suspicion could infer an unlawful purpose was culled from the letters and minutes, and every recommendation or resolution expressing a consensus of opinion on a trade practice was seized upon as a consummated conspiracy in restraint of trade. All these were brought together in a grand parade of charges, innuendo and invective designed to overwhelm the Court by weight of numbers. This method of proof and argument was effective with the trial court, which devoted much space in its opinion to a review of the unlawful activities of the defendants prior to the organization of the defendant Association, and to the discussions and expressions of consensus of opinion relating to uniform trade practices and selling terms. But all this made little impression on this Court. It ignored altogether the prior illegal activities of the defendants and their suppression of documents and

evidence, and dismissed the evidence concerning alleged blacklisting and uniform practices and selling terms with a few brief sentences, as follows (pp. 600-602):

> "* * * The evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers or that any cooperation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer.
>
> "* * * There was no discussion at these meetings of current prices; no comment on conditions or as to prospect of market, production or prices. Excerpts from the minutes are set out by the Government's brief at great length indicating that from time to time individual representatives of the companies expressed themselves on subjects of minor importance; such as return of bags and bag reports, discounts, the use of trade acceptances where customers desired more than the customary thirty days' discount. But with reference to these suggestions and discussions, either no action was taken, or action was taken adverse to the suggestions made. There is no evidence that any agreement was reached affecting any of the matters discussed; nor does the Government point specifically to any uniformity of trade practice or custom followed, which is urged as even inferentially the result of activities at meetings."

In the absence of proof of such agreement or concerted action, the Court found no occasion to consider or decide

upon the lawfulness of the practices so discussed or proposed. In view of the close parallel between the Government's method of proof and argument in the *Cement* case and the case at bar, these observations of this Court have special significance here. Conspiracy in restraint of trade is not to be proved by innuendo and suspicion, no matter how great the multitude of documents upon which they are based. Something more is required to make a case than mere accumulation of equivocal extracts from correspondence and questionable or improper discussions and proposals at meetings. Trade associations are composed of men unfamiliar with the elusive subtleties and shifting definitions of Anti-Trust law, and it is inevitable that such men will wrongly characterize much that is done and will propose to do much that should not be done. But until real proof is presented of agreement and concerted action in consequence of such discussions and proposals, no conspiracy is shown and no case is presented which calls for decision as to the lawfulness of the practices so discussed and proposed.

V. "Boycotts" and "Blacklists"

Before reviewing the melange of "boycott" cases indiscriminately cited in the Government's brief, it will be useful to state some of the established principles underlying the cases.

The law of boycotts and blacklists is a subject on which there has been much confusion. It has sometimes been assumed, without careful thought, that a boycott, *i.e.*, a concerted refusal by a number of individuals to have dealings of a particular kind with another individual, is illegal

per se, and, assuming boycotts to be thus always illegal *per se,* it is further assumed that like illegality always attaches to a "blacklist" as a means used to effectuate a boycott. It is submitted that there is no foundation in law for the proposition that a concerted refusal to deal, whether effectuated through a blacklist or not, is illegal *per se.* The error arises from failure to draw the elementary distinction between a so-called "secondary boycott" and a "primary boycott". A secondary boycott is, according to some of the authorities, always illegal *per se.* A secondary boycott, is, however, a very special type of concerted refusal to deal and its illegality rests on its special nature. A secondary boycott, as this Court knows, is a concerted refusal to deal with a particular individual, not for the purpose of causing that individual to conform to some standard laid down by the boycotters and in which they have a direct and valid interest, but for the purpose of compelling him in his own turn to refuse to deal with some third person against whom it is the desire of the boycotters to bring pressure to accomplish some result in which they have an interest. A primary boycott, on the other hand, is a concerted refusal by a group to have dealings of a particular kind, or any dealings, with a particular individual for the purpose of causing the individual so boycotted to conform to some conduct desired by the group of boycotters and immediately affecting some interest of theirs. It is not the law that the latter type of boycott is *per se* illegal. If it were, every labor strike would be illegal. A primary boycott is legal or illegal depending upon what conduct on the part of the boycotted individual it is designed to bring about, upon whether the boycotters have a legitimate interest in that conduct, and upon the methods by which they

carry out the boycott. If they have a proper and reasonable interest in having the boycotted individual act as the boycott is designed to cause him to act, *e.g.,* if they have the interest which laborers have in the improvement of their wages and hours of labor which a strike is designed to bring about,—then the "boycott" or concerted refusal to deal is lawful. If, on the other hand, the concerted refusal to deal is designed to bring about conduct on the part of the boycotted individual which the boycotters have no proper or legitimate interest in bringing about, then the primary boycott is unlawful. In other words, everything depends upon whether the conduct which the boycott is designed to bring about is conduct which the boycotters are reasonably and properly interested in having brought about.

The distinction between the primary and secondary boycott is clearly brought out and discussed in *United States* v. *King,* 229 Fed. 275 (U. S. Dist. Ct., Mass. 1915), in an able opinion by Judge Morton. There the Court said (p. 278):

> "Persons have a right to associate for the purpose of advancing their own interests by discriminating against other persons, if such discrimination is based upon proper and legal grounds * * * and is not merely coercive and arbitrary * * * The object of the Aroostook Association is nowhere described in the indictment * * * The reasons for which it blacklisted persons are not stated * * * It does not appear that the defendants were not within their rights in the formation of their association, in giving its officers the right to blacklist, and in agreeing that members would not deal with blacklisted persons. Up to a certain point, the situation described is not legally different from that which

> arises when the executive officers of a labor union declare a strike against a certain employer to obtain shorter hours, higher wages, or some other legitimate end. A strike is merely an agreement by all the members of the union not to do business with that employer."

In order properly to analyze the cases, it is necessary to observe the sense in which the term "boycott" is used and to distinguish between a primary and secondary boycott.

The term "boycott" is used indifferently to describe a mere concerted refusal to deal with a person and also concerted action to induce others to refuse to deal (F. H. Cooke, *"Law of Combinations, Monopolies and Labor Unions"*, 2d Ed. (1909), pp. 50-51).

Perhaps the most careful consideration and analysis of the whole problem is that contained in the articles of the late Professor Jeremiah Smith, published in Volume 20 of the Harvard Law Review (pp. 253, 345 and 429). Professor Smith points out that in every case of an alleged boycott there are inevitably three parties involved: A, the would-be "employee"; C, the possible employer with whom the former is seeking to contract; and B, the person who induces the possible employer to refrain from dealing with the would-be "employee" (20 Harvard Law Review 253 at 265). This three-sided relationship exists irrespective of whether the alleged boycott is a mere concerted refusal to deal or consists of a concerted attempt to induce a third person to refuse to deal. Where the boycott is a mere concerted refusal to deal with A (the would-be employee), C, the person who might otherwise employ A if it were not for the concert, is a member of the concert, and the other

members of the concert are B, the person who induces the possible employer to refrain from dealing with A. On the other hand, where the concerted action takes the form of inducing a third person to refuse to deal with A (the would-be employee), the would-be employer C is now not some member of the concert, but the third person against whom the pressure of the concert is applied; and all the members of the concert acting together are B, the person who induces the possible employer to refrain from dealing with A.

The difference between a primary and secondary boycott is that in the case of a secondary boycott there is inserted between B and C a fourth party D, an outsider, who has no direct interest one way or the other in the object sought to be brought about. B, the combination of persons acting in concert, employs the outsider D as a lever through which to operate indirectly upon C, the possible employer of A, in order to prevent C from employing A. Thus the typical case of a secondary boycott is where the members of a labor union, in order to force employer C to refrain from employing non-union labor, refuse to deal with D, who is a consumer of C's product, unless D in turn refuses to deal with C. This was the fact situation involved in the leading secondary boycott cases of *Loewe* v. *Lawlor*, 208 U. S. 274, cited by counsel for the Government [Brief, p. 282]; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association*, 274 U. S. 37.

The courts have not been uniformly clear in their analysis of, or unanimous in their method of treating, the type of boycott where the members of a combination concertedly refuse to deal with C, not a member of the combination, in order to cause C to desist from dealing or to refuse to deal with A. Thus it has been said:

> "* * * There has been manifested" (in the decisions) "a disposition to distinguish between a combination merely to refuse to deal, and one to induce others to refuse to deal, the latter, though it would seem not necessarily the former, being regarded as illegal" (Cooke, "Law of Combinations, Monopolies and Labor Unions", 2d Ed. (1909) pp. 73-74).

There can, however, be no doubt whatever that a mere concerted refusal by the members of the combination themselves to deal with A, is a primary boycott, and as such is lawful, provided it has a proper justification and is not pursued by unlawful means such as violence, intimidation, etc. That a mere concerted refusal to deal is a primary, as distinguished from a secondary, boycott has been stated by this Court in the following quotation from its opinion in *Duplex Printing Press Co.* v. *Deering, supra*:

> "The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott', that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

In the present case, assuming that the action of the defendants did in fact amount to a boycott, there is no suggestion in the facts or the allegations of anything further than a concerted refusal to deal. There is, for ex-

ample, no suggestion whatever of any concerted refusal to deal with C in order to cause C to refrain from dealing or to refuse to deal with A. The element of secondary boycott, therefore, does not enter into the case. Neither is there any suggestion that the methods employed were tainted with force, violence or intimidation. The whole question is as to whether, assuming that the conduct of the defendants has amounted to a primary boycott, such boycott has a legal justification.

In the articles above referred to, Professor Smith has undertaken to state in general terms the considerations which supply justification. In the following quotation of his summary the word "defendant" refers to the person or persons charged with boycotting and the word "plaintiff" to the person with whom dealings are refused. The summary is as follows:

> "What, in a general way, are the requisites of justification? * * *
>
> "1. There must be a conflict of interest between plaintiff and defendant as to the subject matter in regard to which the damage is done. Or, at least, there must be a legitimate interest of defendant to be directly served as to that subject matter.
>
> "2. The damaging act must be reasonably calculated to substantially advance the interest of the defendant.
>
> "3. The damage resulting to the plaintiff, or to the general public (including the employer), must not be excessive in proportion to the benefit to the defendant. In other words, there must be a reasonable proportion between the benefit to the defendant and the damage to the plaintiff or to the public.

"4. Even where propositions 1, 2, and 3 are made out, the justification must be confined to those cases where defendant uses only his own conduct as a lever, and therewith operates directly upon the possible employer or customer of the plaintiff. Defendant can never justify using his right to work or not to work (or any other right) as a temporal inducement to influence an outsider, or fourth person, to exert pressure upon the possible employer or customer of the plaintiff." (20 Harvard Law Review 361.)

While Professor Smith's statement has primary reference to labor cases, there is no sharp cleavage between such cases and mercantile boycotts so far as the point of justification is concerned. As a matter of fact, Professor Smith points out that one of the chief justifications employed in the labor cases is one which has been borrowed from cases of mercantile boycotts. (20 Harvard Law Review, bottom of page 356.)

It is submitted that if there is any element of boycotting or blacklisting in the defendant's refusal to deal with brokers or warehousemen whose conduct or method of doing business encourages frauds against the refiners or promotes or cloaks violations of the Code principle of selling only at open prices, without discriminations between customers, then such boycotting is squarely justified under all of Professor Smith's four principles set forth above and should be held lawful unless specifically invalidated by direct authority in the precedents; and it is submitted that there is no such authority. All that the precedents hold is that a primary boycott is illegal where not supported by reasonable and proper justification.

An examination of all the cases under the Anti-Trust laws in which a boycott or blacklist has been held illegal reveals that in every instance the concerted refusal to deal was either a secondary boycott or, if a primary boycott, was for an unjustifiable and illegitimate object. The cases fall into two broad classes: (a) the "labor" cases, where union employees have concertedly refrained from doing work for their employers upon or in connection with materials supplied from non-union sources; and (b) cases where business concerns have concertedly refrained from selling to or buying from other business concerns in order to bring pressure upon the latter to cease dealing with particular kinds of customers.

The first of these groups of cases, *i.e.*, the "labor" cases, affords the typical example of the so-called secondary boycott. In every instance the concerted refusal to work for A, the employer of the striking workmen, was not for the purpose of causing A to follow a course of conduct directly beneficial to the workmen, but rather to cause embarrassment to B, from whom A was obtaining his supplies, in the hope of thereby inducing B to follow a course of conduct supposedly beneficial to B's workmen. This group of cases is represented by *Loewe* v. *Lawlor*, 208 U. S. 274 (cited at bar, Govt. Br., p. 282); *United States* v. *Brims*, 272 U. S. 549; *Bedford Cut Stone Company* v. *Journeymen Stonecutters' Association*, 274 U. S. 37; *Decorative Stone Co.* v. *Building Trades Council*, 18 F. (2d) 333.

The second group of cases in which a boycott or blacklist has been held illegal are those involving mercantile boycotts or concerted refusal of one group of business concerns to deal with another. Typical of these cases are the

following, which are cited by counsel for the Government in support of their contentions for the illegality of warehousemen and broker regulations [Govt. Br., p. 282]:

Eastern States Retail Lumber Dealers Association v. *United States,* 234 U. S. 600;
United States v. *First National Pictures, Inc.,* 282 U. S. 44;
Paramount Famous Lasky Corporation v. *United States,* 282 U. S. 30;
Binderup v. *Pathe Exchange,* 263 U. S. 291;
Anderson v. *Shipowners Association,* 272 U. S. 359.

In every one of the foregoing cases, which we have reviewed in the Reply Brief or shall presently review in this Appendix, and in all other cases of this class, it will be noted that there was only one possible element of justification which could be alleged for the boycott or blacklist involved,—namely, to increase the business advantage of the group or association engaged in the boycott. The issue raised by these cases was simply whether *the financial advantage of the members of the combination,* in placing their customers, their competitors, or the competitors of their customers, at a disadvantage, amounts of and by itself, to a sufficient legal justification of a boycott conducted for that purpose and having that result. The cases decided under the Anti-Trust Act must be taken as holding that it does not.

It is interesting to note that in many state jurisdictions an opposite result has been reached in precisely this type of case on the theory that the concerted action taken is a competitive device and, as such, is within the protection

which the law gives to free competition. (See Smith, 20 Harvard Law Review 356; Cooke, *Law of Combinations, Monopolies and Labor Unions*, §§ 26, 34; Wyman, 15 Harvard Law Review, 440 ff.) Such cases were *Bohn Manufacturing Company* v. *Hollis* (1893), 54 Minn. 223, 55 N. W. 1119; *Macauley* v. *Tierney* (1895), 19 R. I. 255; *Park* v. *National Wholesale Druggists Ass'n* (1903), 175 N. Y. 1; *Montgomery Ward* v. *South Dakota Retail Merchants Ass'n* (1907), 150 Fed. 413; *Master Builders' Ass'n* v. *Domascio* (1901), 16 Colo. App. 25. The theory of these cases is that the self-interest of the parties is sufficient justification for their resort to a method of competition which, while it injures the parties against whom it is directed, will also presumably result in corresponding advantage to those who apply it. As stated by the Court in *Macauley* v. *Tierney, supra*:

> "* * * If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation, for the sending of the notices? We think the question must receive an affirmative answer * * * Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition."

The decisions under the Anti-Trust Acts may be taken as holding on the contrary that competition in this sense is not in itself a justification for concerted refusal to deal, at least in the situations and under the circumstances covered by the cases. There is no reason whatever to take these decisions as establishing any such sweeping and unlimited generalization as that there can be no lawful justification at all for a concerted refusal to deal. They simply represent what, it is submitted, is an altogether wholesome progress away from the doctrine of the state cases that mere self-interest and "competition", in the sense of *any* device that promotes self-interest, constitute sufficient justification. They represent a recognition that mere competition as such in the sense of any device of business rivalry is not in itself protected by the Anti-Trust laws, and that *a competitive device may in fact violate those laws.* As the case at bar itself illustrates, the device of secret discriminations is not a legal method of competition fostered by the Anti-Trust laws.

The decisions of this and the lower Federal Courts are unanimous in holding that concerted action in an industry, including a concerted refusal to deal, is lawful under the Anti-Trust laws if supported by a proper justification. In addition to the *Cement,*[5] *Chicago Board of Trade*[6] and *Appalachian Coals*[7] cases to this effect [reviewed in Appellants' Opening Brief at p. 260-262] the following decisions so hold.

Thus in *Anderson* v. *United States,* 171 U. S. 604 the so-called "yard traders", who formed an important class of

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[5]268 U. S. 588.
[6]246 U. S. 231.
[7]288 U. S. 344.

purchasers of live-stock at the Kansas City stockyards, one of the principal live-stock markets in the country, were organized into an association which had a rule that no member of the Association should buy from those who also sold to traders not members of the Association. The Supreme Court held the rule not an unlawful restraint of trade, saying:

> "The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to its jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them * * *
>
> "If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, the possible effect of such a course of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account."
>
> *Anderson* v. *United States,* 171 U. S. 604, at pp. 618, 619.

The Court's reference in the last sentence to interstate commerce has to do with the burdensomeness on such commerce of the alleged restraint,—in other words, with the same question which since *Standard Oil Company* v. *U. S.,* 221 U. S. 1, has been dealt with in the guise of the "reasonableness" of the restraint. There was no question that the defendants were engaged in interstate commerce,—the Court assumed that they were [171 U. S. at p. 615]:

> "In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade,* * *"

The position thus taken by the Court prior to the announcement of the "rule of reason" in the *Standard Oil* case was that where a restraint is reasonable and proper, then, even though the parties are engaged in interstate commerce, the restraint will be held not to restrain interstate commerce, but only to incidentally affect it. The analogy was applied of a State's reasonable exercise of its police power, which will apply validly to the subject-matter of interstate commerce and not be held to burden it, but only to incidentally affect it. In other words, the Court's analogy of state police regulation affecting the subject-matter of interstate commerce indicates as the test of lawfulness of concerted action affecting such commerce the question whether or not the purpose and effect of the concert is to obstruct or burden it,—*i.e.*, whether or not it is "reasonable" in the sense that the advantages of the restriction from the standpoint of the public interest will counterbalance the disadvantages of such obstruction as may be involved. In the present phraseology of the Court, as for example the language of Justice Brandeis in the *Chicago Board of Trade* case, *supra,* the ultimate question remains the "reasonableness" of the restraint in the light of "the facts peculiar to the business; * * * its condition before and after the restraint was imposed; * * * the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained".

Reasonableness is always the question, at the end, and the question of reasonableness in connection with restraint of trade relates to the promotion or hindrance of the *wholesome* competition which operates through the free play of *wholesome* market forces.

This exact thought was most forcefully expressed by the Chief Justice in the Appalachian Coals opinion [see Appellants' Reply Brief pp. 133-35].

Other decisions upholding as lawful under the Anti-Trust laws a concerted refusal to deal, even if accompanied by a blacklist, if supported by a proper justification will be found in *Chamber of Commerce* v. *F. T. C.* (C. C. A. 8th, 1926) 13 F. (2d) 673; *U. S.* v. *Fur Dressers' & Dyers' Assn.* (1925) 5 F. (2d) 869; *U. S.* v. *California Wholesale Grocers Assn.* (1925) 7 F. (2d) 944. See also *Schulten* v. *Bavarian Brewing Co.*, 96 Ky. 224; *Brewster* v. *Miller* (Ky. 1897) 41 S. W. 301; *McCarter* v. *Baltimore Chamber of Commerce* (Md.) 126 Md. 131; 94 Atl. 541 and *Delz* v. *Winfree* (Tex. 1894) 25 S. W. 50.

These cases should be sufficient to show that the legality of a concerted refusal to deal rests on the validity or invalidity of the justification therefor. If competition in the sense of mere selfish pursuit of business advantage affords in itself no justification, it would appear to follow that the courts here as elsewhere recognize that the Anti-Trust laws distinguish between mere business rivalry and socially beneficial competition, and cast their protection only around the latter. If this is true, as argued throughout our briefs in this case, it follows logically that concerted action, not to promote mere rivalry, but to protect the operation of true economic competition, should afford a valid justification for a concerted refusal to deal where the concert is a reasonable method of so protecting such competition.

Review of Government's Cases on Boycotts

We have already classified the decisions cited by counsel in support of their argument against the Institute's "Boycotting Activities", and have shown them to be governed by principles not applicable to the case at bar. We will, however, review here each of the cases relied upon by counsel (except the *Eastern States* and *First National Pictures* cases which the Government have particularly relied upon and which are discussed in the Reply Brief) so that we may leave no doubt whatever as to their inapplicability here.

Loewe v. *Lawlor,* 208 U. S. 274. This was a suit for threefold damages against a labor union, in which a demurrer to the complaint (on the ground that the combination was not within the Sherman Act) was sustained.

This case being presented in 1908, Mr. Beck, for the plaintiff, argued that (p. 275):

> "The Anti-Trust Act is not limited to restraints of interstate trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce. *Northern Securities Case,* 193 U. S. 197, 331."

The combination (The American Federation of Labor) was alleged by plaintiff to be (p. 305):

> "* * * 'engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their factories,

into an organization, to be part and parcel of the said combination known as The United Hatters of North America, or as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons, other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort and purpose, by restraining and destroying the interstate trade and commerce of such manufacturers, by means of intimidation of and threats made to such manufacturers and their customers in the several States, of boycotting them, their product and their customers, using therefor all the powerful means at their command, as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories."

Upon these facts, the Court held a *secondary* boycott illegal. The case at bar has, of course, no elements of a *secondary* boycott and is, therefore, not within that class of cases at all, as has already been fully demonstrated. We refer to this decision only as an illustration of the indiscriminate use of authorities by counsel for the Government in this case.

Paramount Famous Lasky Corp. v. *U. S.*, 282 U. S. 30. In this case the distributors in control of the film industry forced down the throats of all the exhibitors a compulsory arbitration contract. They decided that they preferred to have their disputes with the exhibitors submitted to arbitration instead of to the courts, and they therefore combined *to compel the exhibitors to give up their legal*

right to resort to the courts. They accomplished their purpose by enforcing heavy demands and penalties against any exhibitor who might refuse to sign the arbitration contract and they thereby compelled all to sign them. The unreasonable and unfair effect of the arbitration contracts is shown by the following statement of the facts contained in the official summary of the Government's argument at page 35 of 282 U. S.:

> "The arbitration provisions of the standard exhibition contract and the manner in which they have been enforced are unfair and unjust to the exhibitors. All exhibitors outside the State of New York are compelled to arbitrate under the law of a foreign jurisdiction. The situation of distributors in so arbitrating is very different, since they are large companies guided by New York counsel. Distributors can always appear in person before the arbitration boards, which sit in certain central cities where the distribtuors have exchange managers. Exhibitors, on the other hand, in very many cases can not afford the time or money necessary to travel to these cities to present their arbitration cases in person. The secretary of the arbitration board participates in their deliberations and frequently the secretary of the board is the secretary of the local film board, an association of the local exchange managers of the distributors. The distributor representatives on the arbitration boards are chosen by a highly organized group in constant personal contact with each other. There is no comparable organization or personal contact of the exhibitors from whom exhibitor members of the arbitration boards are selected. In addition, the general counsel of the distributors' national organization has influenced the decisions of the arbitration boards by constant

interpretation, instruction, and advice to the distributor members of these boards. The records of an arbitration board which were stipulated to be typical of the operation of other arbitration boards show that almost all claims presented by distributors were decided in their favor, although exhibitors were successful in only a little over half of the claims presented by them and also, and perhaps more important, that over ninety-four per cent. of the claims on which the board acted were filed by distributors.

"The history and antecedents of the arbitration provisions of the standard contract indicate that a great majority of the exhibitors whose theaters are not owned or controlled by distributors or producers disapprove these provisions."

The reasoning of Mr. Justice McReynolds in holding this restraint illegal affords no support at all for counsel's theme of "illegality *per se*". On the contrary, the decision proceeds expressly on the principle that only those restraints which *unreasonably* suppress competition are illegal, as the following quotation from the opinion will show (p. 43):

"The Sherman Act seeks to protect the public against evils commonly incident to the *unreasonable* destruction of competition and no length of discussion or experimentation amongst parties to a combination which produces the inhibited result can give validity to their action. Congress has so legislated 'as to prevent resort to practices which *unduly* restrain competition or *unduly* obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.' *Eastern States Lumber Assn.* v. *United States, supra,* 613.

"It may be that arbitration is well adapted to the needs of the motion picture industry; but when

> *under the guise of arbitration* parties enter into unusual arrangements which *unreasonably* suppress normal competition their action becomes illegal."

In this decision we find therefore that the distributors, solely because they, in their own interest, preferred arbitration to litigation in disputes with the exhibitors, united to force all distributors to sign contracts giving up their right to appeal to the courts, and agreeing to arbitration under oppressive conditions favoring the distributors. Upon the express ground that this was an *unreasonable* and therefore *undue* restraint, this Court held it unlawful.

Binderup v. *Pathe Exchange,* 263 U. S. 291. This was an action for three-fold damages under §7 of the Sherman Act by an exhibitor of motion pictures against a combination of the producers, in which it was alleged that the combination had conspired to and was endeavoring to drive plaintiff out of business. The allegations of the conspiracy showed an indefensible attempt to ruin the exhibitor, and included such allegations as these (p. 303):

> "* * * the exhibitor's business was successful and profitable and that, the cupidity of the distributors being thereby aroused, some of them requested a share of his patronage, and, upon his refusal, made threats to put him out of business by underbidding and supplying the various theatres constituting his circuit; that the Omaha Film Board of Trade was organized for the purpose of enabling these distributors to control prices and dictate terms to their patrons in Nebraska and other States. It is further alleged that the business of the exhibitor had grown to large proportions; that he was procuring films from some of the members of the Omaha Film Board of Trade, but had refused to

buy from others, and that thereby a spirit of hostility was aroused against him on the part of the latter who thereupon brought great pressure to induce those with whom he was dealing to cease doing business with him; that all the defendants in error thereupon unlawfully combined and conspired in restraint of trade and commerce among the several States, with the purpose and intent of preventing him from carrying on his said business and with the intent to ruin him; that they caused false charges to be made against him before the Film Board of Trade, and, without his knowledge or an opportunity to be heard, placed him upon its blacklist, of which notice was given to distributors who thereupon refused to transact further business with him; that those distributors who were not members of the Film Board of Trade cooperated with and approved the action of the Board and conspired with the others to ruin the business, credit and reputation of the exhibitor; * * *"

The Trial Court dismissed the action after plaintiff's opening statement and without a trial on the merits. This Court held that these allegations of a conspiracy to drive an exhibitor out of business *because he had failed to give a part of his business to some of the conspirators* constituted a cause of action under the Anti-Trust Act. Obviously this was no sufficient justification for the suppression of the plaintiff's business. The case has, therefore, no bearing on the questions at bar.

Anderson v. *Shipowners Association,* 272 U. S. 359 decided that it was error for the lower court to dismiss a complaint by a seaman under the Anti-Trust Act against a combination of substantially all Pacific Coast ship owners, which combination had, without just cause, pre-

vented plaintiff from securing work. Plaintiff alleged that the combination enforced elaborate registration requirements for the seamen, fixed their wages, and otherwise arbitrarily restricted the rights of the seamen to secure employment freely. No necessity for such restrictions were, of course, alleged in the complaint, nor any justification therefor, attempted, and the ruling of this Court merely was that "as the case then stood, the combination was in violation of the Anti-Trust Act" (p. 365).

We call attention to the fact that subsequently the case was tried on its merits and dismissed on the facts. *Anderson* v. *Shipowners Association* (1928) 27 F. (2d) 163. This dismissal was affirmed by the Ninth Circuit Court of Appeals in (1929) 31 F. (2d) 539, to which certiorari was denied by this Court (1929) 279 U. S. 864.

In concluding this discussion of counsel's misapplication of the "boycott" cases, we desire to quote the words of Judge Hough in *Gill Engraving Co.* v. *Doerr* (1914) 214 Fed. 111, where that eminent judge in pointing out a similar misapplication of the boycott cases said (p. 118):

> "* * * There will also be disregarded much argument resting on the statement that defendants have produced a boycott. In common parlance, a boycott has been attempted or created. But the word is a vague signification, and no accurate and exclusive definition has, so far as I know, ever been given.
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> "Nor does it advance matters to call the affair a boycott, for 'it cannot be said that to boycott is to offend the law,' *Mills* v. *U. S. Printing Co.*, 99 App. Div., 611, 91 N. Y. Supp. 185, affirmed in 199 N. Y. 76, 92 N. E. 214. This is not thought to mean that every form of boycotting is lawful, but that the word does not necessarily import illegality. I do not perceive any distinction upon which a legal

difference of treatment should be based between a lockout, a strike, and a boycott. They often look very unlike, but this litigation illustrates their basic identity. All are voluntary abstentions from acts which normal persons usually perform for mutual benefits; in all the reason for such abstention is a determination to conquer and attain desire by proving that the endurance of the attack will outlast the resistance of the defense; and for all the law of New York provides the same test, viz., to inquire into the legality (1) of the object in view, and (2) of the means of attainment. When courts generally (with some legislative assistance from behind) abandoned the doctrine that any concerted arrangement which hindered the following of a trade or constituted an attempt to change trade conditions (especially wages) amounted to an actionable conspiracy, this judicial position was quite sure to follow, unless it was admitted that the passing of the old doctrine had left the matter political rather than judicial. This has not yet been done."